No. 21172

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALAN HARVEY RICE, LAWRENCE STANFORD TOROKER, EDDIE JAVOR,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' CLOSING BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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The Procedures Used in the Court Below Were Inadequate to Insure a Reliable and Clear Cut Determination of the Voluntariness of the Rice and Toroker Confessions, Including a Clear Cut Resolution of Disputed Facts Upon Which the Voluntariness Issue May Depend.

The Court below did not make a full and reliable determination as to whether or not the confessions of Rice and Toroker were voluntary or involuntary. It rather abdicated its responsibility in this regard to the jury and made no finding on the question of voluntariness. As stated by the United States Supreme Court in *Jackson v. Denno,* 378 U.S. 368, 390-391 (1964):

> "Where pure factual considerations are an important ingredient, which is true in the usual case, appellate review in this Court is as a practical

> matter, an inadequate substitute for a full and reliable determination of the voluntariness issue in the trial court and the trial court's determination, pro tanto, takes on an increasing finality. *The procedures used in the trial court * * * must, therefore be fully adequate to insure a reliable and clear cut determination of the voluntariness of the confession including the resolution of disputed facts upon which the voluntariness issue may depend.*" (Emphasis supplied).

"The District Court was required to make a finding on the record with 'unmistakable clarity' that * * * the confession or statement was freely and voluntarily made". *Evans v. United States,* 375 F. 2d 355, 360 (8th Cir. 1967). See also *Sims v. Georgia,* 385 U.S. 538 (1967).

In this instant case the court below, after recognizing that the question of whether or not the confessions were voluntary was a question of fact [Rep. Tr. pp. 468-469], did not attempt to resolve these issues, and therefore it could make no appropriate factual findings thereon [Rep. Tr. p. 479].

The Respondent cites a statement of the court at (Resp. Br. p. 13) ("the Court has to be convinced first of all that it is a voluntary confession, *or that the jury may reasonably consider it as a voluntary confession.* Then it becomes a question for the jury to determine * * *") (Emphasis supplied by the Appellant), to indicate the court's awareness of its responsibilities. It is urged by the appellant that what is indicated is the court's misunderstanding of its functions. This Honorable Court's attention is directed to

the underlined portion of the Court's statement where it clearly states its belief that "if the evidence presents a fair question as to its voluntariness as where certain facts bearing on the issue are in dispute or where reasonable men could differ over the inference to be drawn from undisputed facts, the judge 'must receive the confession and leave to the jury under proper instructions the ultimate determination of its voluntary character and also its truthfulness'" (*Jackson v. Denno, supra,* at 378 U.S. 377.) This quoted procedure which the court below accepted as its own concept of the law reflects the very procedure which was declared unconstitutional in *Jackson v. Denno, supra.*

The respondent goes on to say that "the court accepted that the confessions were admissible as voluntary." (Resp. Br. p. 13). It is respectfully submitted that no such finding was ever made with the "unmistakable clarity" required. The only thing the court did was to state on two occasions outside the presence o fthe jury [Rep. Tr. pp. 477, 479] that there is a conflict in the evidence which must go to the jury and that the jury must decide. The court also told the jury that it had made no decision on voluntariness and was giving them the entire question to decide [Rep. Tr. p. 515]. This, of course, was the absolute truth as evidenced by the court's same statement out of the jury's presence.

In its brief (Resp. Br. p. 14) the respondent attempts to explain away the court's remarks to the jury by asserting that they were only made to protect the record. Surely the respondent is not suggesting that the court made a deliberate and unnecessary misstatement to the jury!

There Was No Stipulation or Agreement as to the Narcotic Content and Chain of Custody of Certain Government Exhibits.

In all candor a reading of the Reporter's Transcript at pages 76 and 77 would tend to indicate that the Government and appellants were going to enter into some stipulations regarding the narcotic content and chain of custody of certain *undescribed* exhibits. It must, however, also be noted in fairness to the appellants that this vague agreement was prior to any of the exhibits being identified by exhibit number or content as the agreement referred to in the respondent's brief (p. 21) precedes any identification and marking of exhibits.

The Government actually began its *proposed* stipulation on the lower portion of Reporter's Transcript page 77 and was interrupted by the Court [Rep. Tr. pp. 77-78], Mr. Sobel [Rep. Tr. p. 79], and Mr. Lambros [Rep. Tr. p. 80] with questions by each that indicated a lack of agreement in which areas the record does not reflect concurrence by all defense counsel and the Government.

Government counsel was well aware that the proposed stipulation had not yet been made at Reporter's Transcript page 80 when she answered a question of Mr. Lambros about whether she was offering the exhibits into evidence, by stating:

> "After you have agreed to the stipulation I will offer the documents and their contents."

In any event the stipulation as to narcotic content was never effected or really even clearly offered, and there was no proposed stipulation on the chain of custody regarding the exhibits.

Black's Law Dictionary defines the word "stipulate" as follows: "Arrange or settle definitely, as an agreement or covenant", citing *Mennan Co. v. Krauss Co.,* 37 Fed. Supp. 161, 163 (E.D. Lou. 1941). Surely there was no *definite* settlement or agreement in this case. If this were a civil suit, would an action for breach of contract be won by the Government? Of course not; and it is implicit that the burden of the Government is even greater in a criminal action. Black's Law Dictionary, in defining the term "stipulation" states:

> "An agreement between counsel respecting business before the Court. *It is not binding unless assented to by the parties or their representatives* and most stipulations are required to be in writing" (Emphasis supplied).

citing *Holland Banking v. Continental,* 9 Fed. Supp. 988, 989 (W.D. Miss. 1934). There was no assent, and, therefore, there was no stipulation as to narcotic content or chain of custody.

The case cited by respondent, *McBain v. Santa Clara Savings,* 241 Cal. App. 2d 829, 838 (1966), is a situation where the plaintiff and one defendant entered into a *complete* stipulation as to what the testimony of one of the stipulating attorneys would be if he were called as a witness. During the discussion regarding this stipulation, one of the counsel for another defendant remained silent and later contended he was not bound. The Court ruled that he was in that case, in which ruling the appellant might well concur; but in our case there was no definite agreement between any

of the parties. In the case cited, the Court actually stated that:

> "A stipulation is an agreement between counsel respecting business before the court . . . and like any other agreement or contract, it is essential that the parties or their counsel agree to its terms."

The respondent in its brief points out that several of the exhibits were subjected to the Marquis Reagent test, which is a field test to determine the presence of an opiate, and gave a positive result indicative of the presence of an opiate (Resp. Br. p. 22). In the first place it was never established that the Marquis Reagent test is a reliable test for use in court. Secondly the men administering the test were never qualified as experts. Even if we were to assume that the test were valid and its administrators experts, what does it prove? Merely that the substance contains opium, morphine, heroin, or an opiate derivative [Rep. Tr. p. 101]. The defendants here were all charged with either heroin, cocaine or marijuana [Rep. Tr. p. 1430], and the jury was told that heroin and cocaine are narcotic drugs within the meaning of the statute [Rep. Tr. p. 1431]; but how about opium, morphine, or an opiate derivative that is manufactured in Los Angeles as morphine is? What are opium derivatives, and is it possible that some are harmless non-narcotics?

It is submitted that obtaining a proper stipulation on the narcotic content and chain of custody, in the absence of proper expert testimony, which shows an understanding waiver of a defendant's rights is not too great a burden on the United States Government or the administration of justice. The court below instructed the jury and properly so, that an essential element of the

crime was proof that the exhibits were heroin, cocaine and marijuana and the government had to prove each essential element of the crime beyond a reasonable doubt [Rep. Tr. p. 1432]. In other words before the government could convict it was obligated to prove the narcotic content of the exhibits. If an accussed does not face the government to its proof he is giving up the right to make the government prove an essential element of its case. A stipulation *re* narcotics content and claim of custody is therefore the equivalent of consenting to a search and the courts insist upon a clean and understanding waiver of a defendant's rights before such a waiver will be given effect.

The Court's Instructions on Entrapment Did Constitute Prejudicial Error.

The respondent first states that because the appellants denied the commission of the offenses charged against them in certain counts in the indictment, they are not entitled to the defense of entrapment, citing *Ortiz v. United States,* 358 F. 2d 107 (9th Cir. 1966), and *Ortega v. United States,* 348 F. 2d 874 (9th Cir. 1965).

A reading of the record with particular attention to those portions of the reporter's transcript cited in the respondent's brief (Resp. Br. pp. 13-14), reveals that Rice and Toroker are really not denying any of the offenses in the indictment, but only equivocating with the agents' testimony on several facts. They do not deny the fact that they sold heroin and cocaine to Government agents, which is the real gravamen of this case, but rather admitted these sales (receiving, transportation and concealment) charges, with some factual

differences in their testimony which the respondent is now attempting to make into a denial of specific charges —which never was the case. *United States v. Ortega, supra,* at 876 (Headnotes 2 and 3). It must also be noted that in the cases cited by the respondent the instruction on entrapment was not given as it was in this case, so the issue is really quite different.

While it is certainly true that ordinarily a party who requests a certain instruction is hardly in a position to object to that instruction, we have a different situation in our case because the defendants were entitled to assume that the time-honored court instructions which was requested was the only one the court would consider. *Robison v. United States,* .... F. 2d .... (9th Cir. No. 20752) does not stand for the proposition cited by the respondent because in that case the instruction was substantially the same as in *Notaro v. United States,* 363 F. 2d 169 (1967), and the jury was properly instructed by the court on burden of proof, whereas in our case it was not.

In any event the appellants are at least entitled to the instruction they requested and not one which completely leaves out the proper wording regarding "predisposition" to commit crime and the particular burden of proof with regard thereto. If the learned and conscientious judge in the court below accidentally misread the form instruction, then surely defense counsel cannot be blamed for making a similar error to their clients' prejudice. This is a perfect example of plain error, Federal Rule of Criminal Procedure 52(b), which is not cured by the failure to object.

The Evidence of Javor's Other Crime Was Irrelevant in That It Was Highly Prejudicial and Unrelated to the Crimes for Which Javor Was Being Tried.

The respondent contends that its *deliberate* introduction before the jury of Javor's other crime was perfectly reasonable to show "knowledge of transporting heroin on that occasion and his lack of innocent purpose for the trip to Tijuana" (Resp. Br. p. 17), citing *Reed v. United States,* 364 F. 2d 630 (9th Cir. 1966).

The appellant has no quarrel with the holding of *Reed v. United States, supra,* at page 633 that:

> "Evidence of other crimes, despite its prejudicial effect, is admissible to establish motive if it is of *high relevance.* McCormick, *Evidence,* Section 157 p. 330 (1954)" (Emphasis supplied.)

A reading of McCormick's text reveals the same high relevance requirement for knowledge and lack of innocent purpose. The examples cited in that eminent author's book on the point in question illustrate that the measure of relevance here is not that required by either McCormick or the above-cited case.

It is interesting to note that the respondent in its brief does not even allude to the appellant's argument that the reason this evidence was ever admitted by the court below was because of an offer of proof which was made by the Government and then never submitted to the jury (App. Br. pp. 21-22).

In *Diaz-Rosendo v. United States,* 364 F. 2d 941, where the defendants were charged with conspiring to import marijuana and of aiding and abetting smuggling marijuana, wasn't the marijuana found in the

car they were driving more relevant than Javor's failure to register at the border?

For evidence of other crimes to be admissible, it must be highly relevant "and should be excluded even though relevant if the value of the evidence is limited and the anger of prejudice from its use is great." *DeVore v. United States,* 368 F. 2d 396, 398 (9th Cir. 1966).

Eddie Javor Did Not Have Either Actual or Constructive Possession of the Narcotics in This Case.

The appellant in its opening brief contended that the record does not support a finding of actual or constructive possession in this case and therefore the court's intructions on the inference arising from possession and aiding and abetting constituted reversible error (App. Br. p. 28). In response thereto the respondent stated that Javor was the supplier of the heroin, that he had actual possession of it when he gave the narcotics to Mr. Cagle in Tijuana, and that a later telephone conversation showed Javor had joint constructive possession of the heroin when it was sold to Federal agents on June 7, 1965 (Resp. Br. p. 23).

A review of the record in this case reveals that the respondent's contentions are not sustainable even given the favorable inferences which attach to the government's evidence on appeal.

Cagle testified that Javor showed him "a bag containing two prophylactics and with some sort of something in it" [Rep. Tr. p. 157]. Javor told him it was "*cocaine*" [Rep. Tr. p. 158]. After they got back to Los Angeles from Tijuana Cagle returned the package

to Javor [Rep. Tr. p. 159]. Even though the testimony of Cagle is accepted at face value by this Honorable Court, it only establishes that on June 6, 1965 Javor caused to be imported into the United States two rubber contraceptives which he said were filled with "*cocaine*". That certainly does not prove that Javor had actual or constructive possession of the *heroin* which was sold to agents Salmi and Sherman on June 7, 1965. There is no chain of custody shown from Javor to Rice and Toroker for the narcotics Javor allegedly had Cagle bring across the border for him.

The alleged telephone conversation referred to by the respondent may be seen at Reporter's Transcript, page 282. Even if that highly unlikely conversation is to be believed, there is absolutely nothing therein to show that Javor ever had either actual or constructive possession of the heroin. At the very worst (from the appellant's point of view) it shows that Javor may have been involved as a conspirator, but not as one who possessed the heroin, *Hernandez v. United States,* 300 F.2d 114, 120 (9th Cir. 1962). The same argument should also apply to bring this case within the ambit of *Hill v. United States,* .... F. 2d ...., No. 21,126 (9th Cir. 1967).

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. G. SHERMAN